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National Mineral Policy: A Critical Need for Public Awareness (California Coastal Commission v. Granite Rock Co.)

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NOTE

National Mineral Policy: A Critical Need for Public Awareness (*California Coastal Commission v. Granite Rock Co.*)

> We the willing, led by the unknowing, are doing the impossible for the ungrateful. We have done so much for so long, with so little, we are now qualified to do anything with nothing.[1]

INTRODUCTION

The Big Sur region along the central California coast affords the visitor an impressive view of merging natural resources. The Pacific Ocean and shoreline blend with the Coast Ranges and its associated natural resources to create a unique panorama. Pico Blanco is a white peak forming part of the Coast Ranges south of the town of Big Sur. Pico Blanco also contains the largest known deposit of chemically pure high-grade limestone[2] west of the Mississippi River.[3]

The Granite Rock Company[4] (Granite Rock) began exploring the Pico Blanco area in 1962 to determine the economic viability

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1. This phrase, of unknown origin, has been a motto of the laborer throughout American industry. Historically, the American miner used this phrase to represent his attitude toward management. It is suggested that today this phrase reflects the mining industry's view toward much of the American public.

2. Limestone of this quality has over sixty recognized uses and in many cases is an essential element for a completed product. Some of the large volume uses are: (1) water filtration and acid reduction; (2) stack gas control for acid removal on large combustion plants; (3) acid rain controls; (4) acid control of lakes and reservoirs; and (5) neutralization of chemical toxic waste. Other moderate to large volume uses in which this quality of limestone is an essential element of a completed product are: (1) plastic fillers to replace scarce and expensive petroleum-based products; (2) livestock and poultry feed additives; (3) paint fillers; (4) glass flux for all glass products; and (5) pharmaceutical fillers. Declaration of Bruce G. Woolpert, President of Granite Rock Co. at 3, Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361 (N.D. Cal. 1984) (No. C-83-5137-WWS).

3. The Pico Blanco deposit is estimated by the California Division of Mines and Geology to contain an excess of one billion tons. *Id.* at 1.

4. The Granite Rock Company is a family owned company which was founded in 1900. Since the 1920s, the company has been a major supplier of rock, sand, ready mixed concrete, and asphaltic concrete in the San Francisco and Monterey Bay areas. The company's discovery and exploration work in the Big Sur area began during the early 1960s. *Id.*

of limestone production. The limestone deposit lies partly on private land and partly within the Los Padres National Forest.[5] In the early 1960s, following discovery of valuable minerals, Granite Rock staked unpatented mining claims[6] on lands managed by the Los Padres National Forest.[7]

In 1980 Granite Rock was ready to enter the initial development phase of mining, and test the practicality of commercial production. Granite Rock applied to the Los Padres National Forest for approval of its Plan of Operation.[8] The company received approval for its activity and began quarrying[9] operations in 1981 pursuant to a Revised Plan of Operation[10] issued by the United States Forest Service (Forest Service).[11]

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5. Granite Rock's area of operation is not visible from Highway One, and only slightly visible from the Little Sur Trail (1E03) and the Mt. Manuel Trail (2E06). Los Padres National Forest Environmental Assessment at 10-11, *Granite Rock*, 590 F. Supp. 1361 (No. C-83-5137-WWS).

6. "Unpatented mining claim" applies to minerals that are locatable under the Mining Act of 1872. It refers to title by possession, in the nature of an easement only, and is the mere right of possession and enjoyment of profits, without purchase, and upon condition; and may be defeated at any time by failure of the party in possession to comply with the conditions of 30 U.S.C. § 28. Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428, 430 (1892). The discovery of valuable mineral (extracted and marketed it at a profit) is essential to the validity of an unpatented mining claim. Lombardo Turquoise Milling & Mining Co. v. Hemanes, 430 F. Supp. 429, 433 (D.C. Nev. 1977). Under the law, "mineral" includes metallic and non-metallic minerals. Northern P. R.R. v. Soderberg, 188 U.S. 526, 533 (1903).

7. Los Padres National Forest is the national forest with jurisdiction over Pico Blanco. Los Padres National Forest acts as an agent of the United States Forest Service ("USFS" or "Forest Service") under the jurisdiction of the Department of Agriculture.

8. A "Plan of Operation" (used interchangeably with Operating Plan), is submitted by the operator for approval to the Forest Service pursuant to 36 C.F.R. §§ 228.1-228.15 (1986), which establishes mandatory guidelines for the conduct of operations undertaken on unpatented mining claims. The plan addresses all aspects of the project, from access to the site through final reclamation, with the foremost goal of minimizing adverse environmental impacts. Pico Blanco—Requirements of Plan of Operations, *Granite Rock*, 590 F. Supp. 1361 (No. C-83-5137-WWS).

9. Quarrying is an open-pit mining method where stone is removed from the earth. THE LIVING WEBSTER ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 782 (1977).

10. A "Revised Plan of Operation" is the revised operating plan that is done subsequent to completing the environmental assessment. The environmental assessment is done to reduce the short-term and long-term disturbance to the environment and to provide for reclamation upon completion of the project. Pico Blanco—Revised Plan of Operation, *Granite Rock*, 590 F. Supp. 1361 (No. C-83-5137-WWS) (based upon a review of the original plan submitted by Granite Rock, it seems this proposal was the least costly environmentally safe mining method available). The USFS determined that the original plan failed to adequately address public safety during blasting and the reclamation of disturbed lands which would have resulted from the completed mining operation. Environmental Assessment at 6-7, *Granite Rock*, 590 F. Supp. 1361 (No. C-83-5137-WWS).

11. 36 C.F.R. § 228.8 (1986) (Forest Service Regulations—Locatable Mineral) provides that the operator shall comply with applicable federal and state air, water, and solid waste disposal standards, expressly including, as amended, the Federal Clean Air Act, 42 U.S.C. §§ 7401-42 (1982) and, as amended, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982). Both statutes mandate cooperation between the operator and

In October 1983, the California Coastal Commission[12] (Coastal Commission) notified Granite Rock that it was violating the California Coastal Act of 1976[13] (CCA) and the federal Coastal Zone Management Act of 1972[14] (CZMA). The Coastal Commission demanded that Granite Rock obtain a coastal development permit in addition to the permit it had already obtained from the Forest Service.[15] In response, Granite Rock filed suit in a United States district court against the Coastal Commission[16] requesting the court grant declaratory relief and enjoin the Coastal Commission from compelling a separate permit.[17] The dispute focused on who ultimately controlled mining activity on federal forest lands: a state agency or the United States Forest Service.

Granite Rock alleged that the CZMA expressly excluded federal lands from the coastal zone and that the application of the CCA to federal mining claims was preempted by the Mining Act and Forest Service Regulations.[18] The Coastal Commission answered that even if Granite Rock's unpatented claims were excluded from the coastal zone, neither the Mining Act nor the CZMA preempted the state's inherent police power to regulate private mining activity on federal lands.[19] Granite Rock filed a motion for summary judgment. However, the district court denied Granite Rock's motion and dismissed the complaint finding Granite Rock was not entitled to the relief requested.[20] Granite Rock appealed to the Ninth Circuit Court of Appeals.[21]

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federal, state, and local governments to ensure compliance with all relevant statutes and regulations. (All applicable laws and regulations were complied with prior to the issuance of the "Revised Plan of Operation"). Amended Complaint and Answer to Amended Complaint, *Granite Rock*, 590 F. Supp. 1361 (No. C-83-5137-WWS).

12. The California Coastal Commission is the administrative agency under the California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30604 (Deering Supp. 1987), enacted pursuant to the federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1982 & Supp. IV 1986). The Coastal Commission is responsible for the management of California's coastal zone within the limits set by Congress.

13. California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30604 (Deering Supp. 1987).

14. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1982 & Supp. IV 1986).

15. Letter from Edward Y. Brown, District Director of the California Coastal Commission to Bruce G. Woolpert, President of Granite Rock Co. containing the demand for an immediate permit application directly to the state Coastal Commission. Letter From Edward Y. Brown at 1-2, *Granite Rock*, 590 F. Supp. 1361 (No. C-83-5137-WWS). A coastal development permit is defined in § 30101.5 as a permit for any development within the coastal zone that is required pursuant to subdivision (a) of § 30600.

16. Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361 (N.D. Cal. 1984), *rev'd*, 768 F.2d 1077 (9th Cir. 1985), *rev'd*, 107 S. Ct. 1419 (1987).

17. 590 F. Supp. at 1364.

18. *Id.*

19. *Id.*

20. *Id.* at 1375.

21. Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077 (9th Cir. 1985),

The Ninth Circuit, in a unanimous decision, reversed the district court. The Ninth Circuit held that the Coastal Commission's permit requirement was preempted by federal regulations.[22] Upon reversal, the Coastal Commission filed a jurisdictional statement with the United States Supreme Court.[23] The Supreme Court treated the jurisdictional statement as a petition for certiorari and granted the petition.[24]

The Supreme Court reversed, and held that federal law does not preempt state environmental regulations and therefore states can require permits directly from private mine operators on federal mineral lands.[25] The Court distinguished environmental regulations from land use regulations, noting that federal law preempts only the latter on federal lands.[26]

This Note will analyze *Granite Rock*, paying special attention to the Supreme Court's holding that environmental regulations are separate and distinct from land use controls, and therefore are not preempted by federal laws that control mining activity on federal lands.[27] The implications of *Granite Rock* for both the American mining industry and the nation as a whole will also be discussed.[28] An alternative analysis of environmental and land use regulations will be proposed. Contrary to the Court's understanding in *Granite Rock*, land use controls and environmental regulations are inseparable components and, as such, they must be con-

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rev'd 107 S. Ct. 1419 (1987).

22. *Id.* at 1083. For a discussion of the district court and the Ninth Circuit Court's treatment of *Granite Rock*, *see* Burling, *Local Control of Mining Activities on Federal Lands*, 21 LAND & WATER L. REV. 33 (1986).

23. California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987) (as of this writing, *Granite Rock* has not been published in the United States Reports).

24. *Id.* at 1424.

25. *Id.* at 1429.

26. *Id.* at 1427-28.

27. *Id.* at 1427-29.

28. Legislators, environmental groups, industry, and the general public must work together in order to provide the best environment for all concerned. Courts, when interpreting the law, should refrain from judicial legislation. Questions will be posed that this Note will not answer but which should receive considerable thought and analysis nonetheless. For example, is the United States solely concerned with the environment at home, or does this concern extend to the world environment? Who should place the value on aesthetics? Who should define aesthetics if beauty really is in the eye of the beholder? Should America export all raw material production to Third World countries, knowing environmental protection does not exist in those countries? Is it moral to export all environmental risk while demanding the benefits of production? Should America use its present technology to maintain healthy industries, to promote research to improve technological recovery techniques, and set an example for the world? Will the nation be able to maintain its independence without a solid raw material base for the national economy? Is it wise to refuse to recognize that everyone's needs can be met through cooperation rather than confrontation? This list is not, nor is it intended to be, exhaustive of the questions which need to be asked. These questions need answers and must be resolved through understanding and the use of reason rather than emotion.

sidered together. Finally, the Note will conclude by suggesting that when dealing with resource production, the protection of the local environment must be balanced against the resource demand combined with the protection of the national and international environments.[29]

A brief overview of mining law is necessary to fully understand the Supreme Court's decision in *Granite Rock*. A review of these laws will show that land use and environmental statutes and regulations are intended to complement one another rather than to operate independently, thus demonstrating their inseparability.[30]

I. Statutory Framework and Governmental Administration of Mining on Federal Lands

A. Mining Statutes

The principle source of federal mining law is the Mining Act of 1872[31] (Mining Act). The Mining Act granted the federal government sole authority over minerals on federal lands.[32] The Mining Act reserved from sale all lands valuable for minerals,[33] unless expressly directed otherwise by law, but opened public lands to mineral exploration[34] unless, or until, such lands were closed by Congress or the President.[35] Congress recognized how important minerals are to the development and the industrial strength of the nation, and thus retained federal ownership of minerals irrespective of surface ownership.[36] Congress also recognized the importance of the private sector in facilitating the discovery and production of minerals, and thus provided a royalty-free system to

29. With awareness of the nation's demand for consumable products it is unwise to only consider local environments when making decisions. If production is not allowed in one locality, and the demand for the resource continues to exist, the production must come from somewhere else within the nation or from a foreign country. It may well be that the adverse impact may be less in an area such as Pico Blanco than what would occur, for the production of the same resource material, in another area.

30. Throughout the relevant statutes, sections are cited that direct the reader to another statute, either for the purpose of additional controls or to implement the referenced statute.

31. Mining Act of 1872, 30 U.S.C. §§ 21-54 (1982 & Supp. III 1985).

32. 30 U.S.C. §§ 21-54; United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915).

33. 30 U.S.C. §§ 21-29. In United States v. Coleman, the Court held that the land must have present economic viability under the "prudent person" and "marketability" tests. 390 U.S. 599, 602 (1968).

34. 30 U.S.C. § 22.

35. In United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) the Court held that under the property clause of the United States Constitution the Executive is without authority to withdraw lands from mineral entry unless Congress has granted such authority.

36. 30 U.S.C. § 21a provides that minerals are severed from surface ownership.

encourage the development of mineral resources.[37] Congress was also aware that certain issues could be of greater importance than mineral production and, therefore, provided a method to close public lands to private entry for mineral production.[38] Unless or until public lands are closed to mineral entry they remain subject to mineral location under the Mining Act.

Upon discovery of valuable minerals on federal lands, the Mining Act grants the locator the right to extract and sell the minerals without paying a royalty to the federal government, provided statutory requirements are met for creating a valid unpatented mining claim.[39] The holder of a valid unpatented mining claim also has the option of obtaining fee simple title to the land, subject to statutory requirements.[40]

Congress has continually reaffirmed the national importance of an economically stable domestic mining industry.[41] In 1970, Congress enacted the Mining and Minerals Policy Act[42] (MMPA) as an amendment to the Mining Act. The MMPA expressly articulated a "National Mineral Policy." Congress defined the National Mineral Policy in the following terms:

> [I]t is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in

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37. *Id.* at §§ 22-29. Under the Mining Act, United States citizens are permitted to explore for minerals on federal lands and, if found, to stake an unpatented mining claim which gives the party ownership of the minerals. With a valid claim the locator is entitled to remove and sell the minerals without paying production royalties to the federal government. This is done to encourage the development of the nation's resources by private enterprise.

38. *Id.* at § 21; United States v. Sweet, 245 U.S. 563 (1918); Surface Resources Act, 30 U.S.C. §§ 611-612 (1982 & Supp. III 1985). By closing the lands to mineral entry or reclassifying the mineral as a leasable mineral or common variety mineral, Congress may place other national interests above mineral interests. *E.g.*, inclusion of mineral lands in designated wilderness areas; classifying coal, oil and natural gas as leasable minerals; or by reclassifying minerals such as silica as a common variety mineral or oil shale as a leasable mineral.

39. 30 U.S.C. §§ 22, 28-28e. To create an unpatented mining claim, one must: (1) Locate the claim, (2) Record the claim in the appropriate BLM office, (3) Prove the existence of a deposit that is presently valuable for minerals, and (4) Complete the required annual assessment work and record it with the appropriate BLM office.

40. *Id.* at § 29 (The land must be "valuable for mineral" at the time of patent). Today, patents cannot be obtained without current production. If valuable for mineral, patents are almost always applied for though not always granted. Declaration of Roger W. Jeppson, Patent Attorney at 3-4, Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361 (N.D. Cal. 1984) (No. C-83-5137-WWS). The federal government retains fee simple title and can regain equitable title upon default by the holder up until the time the patent issues. Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428, 430 (1892).

41. Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1982 & Supp. III 1985). (Both Justice Powell and Justice Scalia recognized the existence of this Act in their respective dissenting opinions in *Granite Rock*, which reflects an understanding of minerals and the applicable laws.)

42. *Id.*

> (1) developing economically sound and stable domestic mining, minerals, metal, and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources . . . to help assure satisfaction of industrial, security, and environmental needs, (3) mining and mineral . . . research . . . to promote the wise and efficient use of our natural and reclaimable mineral resources and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land . . . to lessen any adverse impact . . . upon the physical environment. . . .[43]

The MMPA directed the Secretary of Interior to submit an annual report to Congress stating the condition of domestic mining and related industries, describing trends in usage and depletion, and making recommendations for congressional action to implement the Act's stated purpose.[44]

Following passage of the MMPA, Congress determined that the United States still lacked a "coherent national material and minerals policy," as required under the terms of the MMPA.[45] As a result, Congress enacted the Materials and Mineral Policy, Research and Development Act of 1980[46] (MMPRDA). Congress expressly recognized an increasing American dependence on foreign sources of minerals, and a decreasing vitality in the American mining industry.[47] The stated purpose of the Act was to establish a coherent and coordinated program ensuring a stable supply of raw materials, including minerals of current or potential use needed to supply the industrial, military, and civilian needs of the United States in the production of goods and services.[48]

Prior to the enactment of the MMPRDA, the Secretary of Agriculture (primarily through the agency of the Forest Service) was responsible for all activities conducted on national forest lands; and this Act did not remove this authority from the Secretary of Agriculture. Congress enacted the MMPA and the MMPRDA to supplement and reinforce, but not supercede, the Mining Act.[49]

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43. *Id.* "Environment" should include not only clean air and water but also the resources required to sustain the human environment (urbanization) that has been created.

44. *Id.*

45. Materials and Mineral Policy, Research and Development Act of 1980, 30 U.S.C. § 1601(a)(7) (1982 & Supp. III 1985).

46. Materials and Mineral Policy, Research and Development Act of 1980, 30 U.S.C. §§ 1601-1605 (1982 & Supp. III 1985).

47. *Id.* at § 1601(a).

48. *Id.* at § 1604(f).

49. *Id.* at § 1605.

B. Statutes Controlling Surface Use of Federal Lands

Shortly after passage of the Mining Act, Congress enacted the Organic Administration Act of 1897[50] (OAA). Recognizing the importance of minerals, the OAA prevented the Secretary of Agriculture from pursuing any action that would prohibit persons from prospecting, locating, and developing mineral resources on national forest lands.[51] Under this Act, Congress provided that the federal government retained sole authority over surface use of federal lands.[52]

In 1976, Congress enacted two additional statutes in recognition of the impact surface uses have upon the physical environment. Both statutes were enacted to give federal agencies authority to regulate activities conducted on federal lands in order to minimize adverse environmental impact, while at the same time encouraging use of federal lands.

The Federal Land Policy and Management Act of 1976[53] (FLPMA) authorizes and directs the Secretary of Interior to prepare and maintain an inventory of all public lands and its resources.[54] The FLPMA is limited to the surface management[55] of lands that are managed by the Department of Interior.[56]

The National Forest Management Act of 1976[57] (NFMA) concerns the surface management of national forest lands managed by the Department of Agriculture.[58] Both the NFMA and the FLPMA direct the respective federal departments to provide for participation by the public, and state and local governments during the planning phase of activities involving federal lands.[59]

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50. Organic Administration Act of 1897, 16 U.S.C. § 478 (1982 & Supp. IV 1986). (This Act established controls for the surface use of federal lands.)

51. *Id.* (The Secretary of Agriculture could not interfere with individuals operating on federal forest lands pursuant to the Mining Act. Also the OAA did not provide for state and local cooperation.)

52. *Id.*

53. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1783 (1982 & Supp. III 1985).

54. *Id.* at § 1711(a).

55. Surface management means those managing activities conducted at ground level. Minerals, on the other hand, are located in the subsurface, below ground level. 30 U.S.C. § 612.

56. 43 U.S.C. § 1701.

57. National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 (1982 & Supp. IV 1986).

58. *Id.*

59. 16 U.S.C. §§ 1600-1614; 43 U.S.C. §§ 1701-1783.

C. *Federal Government Regulations*

The United States Forest Service[60] controls the actual mining activities conducted on national forest lands through the required "Plan of Operation."[61] Congress has repeatedly expressed the view that the management of all federal lands must be consistent with the promotion of an economically viable mineral industry capable of meeting the nation's needs.[62] The USFS regulates the operation of all activities occurring on forest lands, including mining activities.[63] However, the USFS does not determine the validity of mineral leases[64] nor the validity of mining claims located pursuant to the Mining Act.[65] That role is fulfilled by the Bureau of Land Management (BLM) under the FLPMA.

The BLM's role consists of determining whether: (1) the land is open to mineral location under the mining laws, (2) the claim is properly located and recorded, (3) assessment work has been performed in accordance with the mining laws, (4) default has occurred, thus invalidating an unpatented mining claim, and (5) statutory requirements for obtaining a mineral patent have been fulfilled.[66]

In summary, with respect to locatable minerals[67] on forest lands, the BLM's functions are limited to the determination of claim validity, the recording of claims and annual assessment notices, and the transfer of fee simple title from the federal government to the party having fulfilled all statutory obligations for ob-

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60. Department of Agriculture, 7 U.S.C. § 2201 (1982 & Supp. IV 1986). (Congress granted authority to the Department of Agriculture to manage the federal national forest lands through the United States Forest Service.)

61. 36 C.F.R. §§ 228.1-228.15 (1986).

62. Congress placed America's mineral resources in a unique class in enacting the Mining Act by severing mineral ownership from the surface ownership of land. This position was expressly reinforced in 1980 with the enactment of the Materials and Mineral Policy, Research and Development Act. 30 U.S.C. §§ 1601-1605.

63. 7 U.S.C. § 2201.

64. Mineral Lands Leasing Act of 1960, 30 U.S.C. § 192c (1982 & Supp. III 1985). (This statute provides for the transfer of authority over leasable minerals located on forest lands from the Department of Agriculture to the Department of Interior. However, the Department of Interior cannot issue a lease on forest lands without the approval of the Secretary of Agriculture, and without being subject to all regulations governing conduct that are required by the Department of Agriculture.)

65. 30 U.S.C. §§ 21-54; 43 U.S.C. §§ 1701-1783.

66. 43 C.F.R. §§ 3800-3870 (1986). (This is the extent of the BLM's role managing minerals located on forest lands.)

67. 36 C.F.R. §§ 228.1-228.15 (1986); Locatable minerals are covered by the Mining Act of 1872, 30 U.S.C. §§ 21-54 (1982 & Supp. III 1985). Locatable minerals include all minerals recognized by standard authorities, whether metallic or non-metallic, including limestone, that are not identified as leasable or "common variety" minerals. 43 C.F.R. § 3812.1 (1986); Webb v. American Asphaltum Mining Co., 157 F. 203, 206 (8th Cir. 1907).

taining a mineral patent.[68]

II. Summary of Federal Mining Controls

The federal mining laws apply to all federal lands unless Congress or the Executive Branch has expressly withdrawn the land from mineral entry.[69] The validity of mining claims is determined by the BLM, an agency of the Department of Interior.[70] Pursuant to the Federal Land Policy and Management Act, the BLM manages activity conducted on federal lands that is within the jurisdiction of the Department of Interior.[71] The Forest Service, pursuant to the National Forest Management Act, manages activity conducted on federal lands within the jurisdiction of the Department of Agriculture.[72]

There are areas of potential conflict that arise when the statutes are reviewed separately rather than concurrently, as is intended. A conflict may arise if one fails to recognize that mineral rights[73] have been *severed* from surface rights under the Mining Act.[74] Congress established the structure for surface control of all activity conducted on federal lands, including mining activity, by enacting the NFMA and the FLPMA. Both statutes expressly recognize the importance and need for environmental regulations in controlling the manner of land use.[75] A conflict arises between surface control and mining because the Mining Act grants an absolute right to remove valuable minerals.[76]

A second conflict that may arise occurs if one fails to recognize the fact that environmental regulations and land use controls are, *in effect*, only different ways to accomplish the same result—the most beneficial use of natural resources. Both of these conflicts arose in the Supreme Court's *Granite Rock* analysis.[77]

Granite Rock focused on two issues. The first issue addressed by the Supreme Court was whether federal land use controls on

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68. 43 C.F.R. § 3809.0-5 (1986). As defined under BLM surface management regulations, BLM authority over federal lands does not include lands under the National Forest System.

69. 30 U.S.C. §§ 21-54; United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915).

70. 30 U.S.C. § 29; *see also* Cameron v. United States, 252 U.S. 450 (1920).

71. 43 U.S.C. §§ 1701-1783.

72. 16 U.S.C. §§ 1600-1614 (1982 & Supp. IV 1986).

73. Mineral rights are a property interest in minerals in the ground with or without surface ownership, which includes the right to remove the minerals. Black's Law Dictionary 514 (abr. 5th ed. 1983); 30 U.S.C. § 21.

74. 30 U.S.C. § 22.

75. 43 U.S.C. §§ 1701, 1719, 1732(c); 16 U.S.C. §§ 1600, 1604.

76. 30 U.S.C. § 22.

77. California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987); *see infra* notes 132-204 and accompanying text.

federal lands preempted state land use controls.[78] Second, and most important, the Court addressed whether environmental regulations constitute land use controls.[79]

III. The United States Supreme Court's *Granite Rock* Decision

A. Prologue

Although numerous issues were raised by the parties[80] during the course of litigation, not all issues were addressed.[81] The Su-

78. *Id.* at 1427.

79. *Id.* at 1428-29.

80. *Amicus curiae* on behalf of the plaintiff included the American Mining Congress, the United States, Alaska Miners Association, Miners Advocacy Council, and the Placer Miners Association.

Amicus curiae on behalf of the defendants included The Big Sur Foundation, Natural Resources Defense Council, Inc., The Sierra Club, The Wilderness Society, and the states of Alaska, Arizona, Hawaii, Montana, New Mexico, Oregon, Utah, Wyoming, and the Territory of American Samoa.

81. Neither the Supreme Court nor the Ninth Circuit addressed the district court's finding that an unpatented mining claim includes significant property rights, and therefore is equivalent to a patented mining claim irrespective of who holds fee simple title. Also, the Supreme Court majority failed to recognize the existence of the National Mineral Policy or its conflict with the Court's holding.

One of the most critical issues is whether local environmental (aesthetic) concerns can prohibit the production of a natural resource that is required by the nation, where the resource exists in limited locations. This issue reflects the complex interrelationship between related but competing values. Is the value of the natural resource as it is produced of greater value to the nation than the nonproduction of the resource?

Values placed on the same natural resource vary depending on the personal and (or) group interest involved. Granite Rock's interest is in commercial production of a resource in demand, in an efficient and profitable manner. The United States' interest is in retaining control of federal lands, and implementing the National Mineral Policy. The American Mining Congress' interest was that of an industry representative. The Alaska Miners Association, the Placer Miners Association, and the Miners Advocacy Council interests lay with supporting federal laws, preserving the industry, and in preventing precedent from being established due to current litigation by the Sierra Club in Alaska. California, Alaska, Hawaii, Arizona, Montana, New Mexico, Oregon, Utah, Wyoming, and the Territory of American Samoa asserted a "state's rights" interest. The Big Sur Foundation, Natural Resources Defense Council, Inc., the Sierra Club, and the Wilderness Society argued an aesthetic interest which would, in effect, ban mining.

Aesthetics can be defined in many different ways. However, the term as used in this Note refers to the "natural beauty" of an area untouched by mining activity. It would not be appropriate to say "untouched by man" for two significant reasons. First, the Pico Blanco area has roads, numerous hiking trails and campgrounds. Second, it is doubtful that any area of concern is untouched by man; if it were, then its beauty would remain unknown. In fact, The Big Sur Foundation asserted that the Pico Blanco area receives 2.9 million tourists a year. *Amicus Curiae* Brief of the Big Sur Foundation, *Granite Rock*, 107 S. Ct. 1419 (No. 85-1200). By any reasonable standard, the use of a small, limited area by 2.9 million people a year is in itself a significant impact on the environment. When environmental groups place an infinite value on aesthetics it ensures that aesthetics will never lose. It is suggested that in order to determine the real value of the resource the "big picture" must be viewed, looking to both local and national concerns and needs. These comments will be further developed following the analysis of the Supreme Court's decision.

preme Court, in a five-to-four decision, held that environmental regulations are separate and distinct from land use controls, and further held that no actual conflict existed between federal and state permit requirements.[82]

B. Analysis of Granite Rock

The majority opinion formulated the issue as follows: "[W]hether Forest Service regulations, federal land use statutes and regulations, or the Coastal Zone Management Act . . . preempt the California Coastal Commission's imposition of a permit requirement on operation of an unpatented mining claim in a national forest."[83] The Coastal Commission asserted that it had the authority to require Granite Rock to obtain a permit directly from the Coastal Commission even though Granite Rock's unpatented mining claims were not included within the coastal zone.[84] The Coastal Commission further maintained that it had the authority to regulate Granite Rock's activity through a state permit pursuant to the California Coastal Act[85] and the Coastal Zone Management Act.[86]

Congress enacted the CZMA to encourage the public and the states to participate with the federal government in the management of coastal zones.[87] California enacted the CCA pursuant to the CZMA to manage land use within the coastal zone as defined by Congress in the CZMA.[88]

The Coastal Commission, however, did not assert that there were any deficiencies in the "Revised Plan of Operation" which authorized Granite Rock to conduct its operation.[89] Further, the Coastal Commission did not assert that Granite Rock had violated

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82. *Granite Rock*, 107 S. Ct. at 1432. The majority opinion was written by Justice O'Connor. The majority members were Chief Justice Rehnquist, Justice Brennan, Justice Marshall, Justice Blackmun and Justice O'Connor. The dissenters were Justice White, Justice Powell, Justice Stevens and Justice Scalia. Following a hearing in three federal courts and by thirteen judges the decisions favored Granite Rock by a 7-6 vote. Judges deciding in favor of Granite Rock were: Judge Wallace, Judge Poole, Judge Stephens, Justice White, Justice Powell, Justice Stevens, and Justice Scalia. Judges deciding in favor of the Coastal Commission were: Judge Schwarzer, Chief Justice Rehnquist, Justice Brennan, Justice Marshall, Justice Blackmun and Justice O'Connor.

83. *Id.* at 1422.

84. *Id.* at 1424.

85. *Id.* at 1423; CAL. PUB. RES. CODE §§ 30000-30604.

86. *Granite Rock*, 107 S. Ct. at 1423; 16 U.S.C. §§ 1451-1464 (1982 & Supp. IV 1986). (The CZMA authorizes the states to enact coastal land use control statutes that have been approved by the United States Secretary of Commerce as complying with the CZMA.)

87. 16 U.S.C. § 1451(i).

88. CAL. PUB. RES. CODE §§ 30000-30604; 16 U.S.C. § 1453(12).

89. The "Revised Plan of Operation" resulted from the Forest Service review process.

any condition contained in the "Revised Plan of Operation" while conducting operations during the three year period prior to the dispute. Nor did the Coastal Commission, in demanding that Granite Rock obtain a state permit, provide notice to Granite Rock of any requirements necessary for receipt of the state permit.[90]

Granite Rock presented three separate arguments in support of its position that any direct permit requirement under state law was preempted by federal law.[91] First, Granite Rock alleged that the federal government's environmental regulations of unpatented mining claims on national forest lands indicates a congressional intent to preempt state environmental regulations.[92] Second, Granite Rock asserted that state land use controls over unpatented mining claims, including the Coastal Commission's permit requirement, were preempted by federal law.[93] Third, Granite Rock asserted that the Coastal Zone Management Act exempted federal lands from the coastal zone, thereby excluding federal lands from direct state regulation.[94]

The Supreme Court held that the state was not seeking to determine *uses* of federal land but seeking to regulate mining activity.[95] The Court also held that the Coastal Commission had statutorily waived its right under the Coastal Zone Management Act to a consistency review[96] of the "Revised Plan of Operation"[97] for the years 1981-1986.[98] The Court relied on the state's inherent "police power," not on the CZMA, in holding that the Coastal Commission could impose environmental regulations, unless they

90. *Granite Rock*, 107 S. Ct. at 1424; Letter from Edward Y. Brown, District Director of the Coastal Commission to Bruce G. Woolpert, President of Granite Rock Co., Granite Rock Co. v. California Coastal Comm'n., 590 F. Supp. 1361 (N.D. Cal. 1984) (No. C-83-5137-WWS).

91. *Granite Rock*, 107 S. Ct. at 1425.

92. *Id.*

93. *Id.*

94. *Id.* at 1426.

95. *Id.* It appears the Court felt that land use control is determining what type of activity can be conducted on the land, whereas regulation is controlling the on-going conduct occurring on the land by environmental regulation. It is suggested that this is a fictional distinction. The type of activity conducted can be changed by environmental regulation. Further, on-going activity can be controlled through zoning laws.

96. A consistency review is where the applicant is required by federal law to obtain a permit from the appropriate federal agency for activities affecting the coastal zone. The state is entitled to notice of the planned activity and to review the federal permit for compliance with state law in the maximum extent practical. The applicant must comply with a federally approved state plan. If the state agency fails to respond to the notice of planned activity within six months, then the state's concurrence is conclusively presumed. 16 U.S.C. § 1456(c).

97. *See supra* notes 8 and 10.

98. *Granite Rock*, 107 S. Ct. at 1423.

directly conflict with federal law.[99] Finding that the Coastal Commission had properly identified environmental regulations as a possible set of conditions not preempted by BLM regulations, the Court held that the state could impose reasonable state *environmental* regulations through a separate state permit system.[100]

The Court recognized that state law can be preempted if it conflicts with federal law or where it stands as an obstacle to the full accomplishment of congressional objectives.[101] Finding no state imposed obstacle to any congressional purpose, the Court agreed with the Coastal Commission's assertion that environmental regulations are an area of state law that are not preempted by federal law.[102] The Court then treated the entire claim solely as an issue of environmental regulation, and reviewed federal surface management laws and regulations without paying regard to the Mining Act or the National Mineral Policy.

The Court did not find Granite Rock's reliance on the Mining Act,[103] the Coastal Zone Management Act,[104] federal regulations governing unpatented mining claims,[105] and the Property Clause of the United States Constitution[106] as sufficient support for its position. The key factor to the *Granite Rock* decision was the Court's determination that federal law preempts state law only where land use controls are imposed on federal lands. The Court thereby distinguished so-called environmental regulations[107] from land use regulations.[108] It combined the Federal Land Policy and

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99. *Id.* at 1431.

100. *Id.* at 1429.

101. *Id.* at 1425 (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)). The Court stated that "state law is preempted if it stands as an obstacle to the full purposes and objectives of Congress." The Supreme Court failed to recognize the existence of the congressionally mandated National Mineral Policy and the conflict between this policy and direct state control of federal lands. Further, the Supremacy Clause dictates that federal laws enacted pursuant to the United States Constitution shall be the Supreme Law of the Land. U.S. CONST. art. VI, § 2.

102. *Granite Rock*, 107 S. Ct. at 1431.

103. *Id.* at 1426; 30 U.S.C. §§ 21-54.

104. *Granite Rock*, 107 S. Ct. at 1431; 16 U.S.C. § 1453(1).

105. *Granite Rock*, 107 S. Ct. at 1425; 36 C.F.R. §§ 228.1-228.15 (1986) *see* § 228.8. (Operators must comply with all reasonable state laws prior to receiving a federal permit.)

106. *Granite Rock*, 107 S. Ct. at 1425; U.S. CONST. art. IV, § 3, cl. 2. (Congress shall have the power to dispose of and make all needful rules and regulations respecting property belonging to the United States.)

107. Environmental regulations are those which control land use by addressing the manner in which land is used. Environmental regulations cover such issues as discharge into the air and water, solid waste disposal, noise levels, aesthetics, plant and animal life, and land reclamation. 36 C.F.R. § 228.8 (1986). The environment equals the sum total of all external conditions which may act upon an organism or community, influencing its development or existence. DICTIONARY OF GEOLOGICAL TERMS 162 (3rd ed. 1962).

108. Land use regulations are conventionally thought of as zoning laws. In effect they are essentially equivalent to environmental regulations, only stated in a different man-

Management Act[109] and the National Forest Management Act[110] and determined that the two acts combined preempt state land use controls from extending onto national forest lands.[111] The Court then proceeded to find a congressional understanding that land use controls and environmental regulations were separate and distinct activities.[112]

The Court determined that (1) the Secretary of Interior's land use plans must be consistent with state land use plans "only to the extent he finds practical;"[113] and (2) the Secretary's land use plans must "provide for compliance with the applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans."[114] The majority opinion failed to address the FLPMA directive that public lands be managed to implement the Mining and Minerals Policy Act of 1970,[115] which intended the orderly development and production of the minerals previously reserved to the federal government.

Subsequently, the Court looked to selected federal regulations to find further support for its finding that Congress understood land use as being distinct from environmental regulation.[116] Forest Service regulations governing mining activity (pursuant to the Mining Act) control activity to "minimize adverse environmental impacts" on forest resources.[117] The USFS recognizes that management[118] of mineral resources rests with the Bureau of Land

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ner. Height, density, and historical facades address aesthetics. Residential versus commercial zoning address the areas of noise, water, air, and solid waste disposal. The overlap between the two is not limited to this brief comparison. Land use controls are used to determine the basic permissible uses of land. *See Granite Rock*, 107 S. Ct. at 1428. (It is interesting to note that the litigation conducted over a period of four years never identified the specific requirements for obtaining the permit demanded by the Coastal Commission. The Supreme Court assumed the permit to be solely environmental in nature.) *Id.* at 1429. There is no relevant distinction between land use controls and environmental regulations. Land use controls address the type of use while environmental regulations address the manner of use. Both types of restrictions are able to obtain the same end result.

109. 43 U.S.C. §§ 1701-1783.

110. 16 U.S.C. §§ 1600-1614.

111. *Granite Rock*, 107 S. Ct. at 1427.

112. *Id.* at 1428.

113. *Id.* (citing 43 U.S.C. § 1712(c)(9)).

114. *Id.* (citing 43 U.S.C. § 1712(c)(8)).

115. 43 U.S.C. § 1701(a)(12),(b) Apparently from reading sections of the FLPMA independently rather than concurrently the Court omitted from its discussion 43 U.S.C. §§ 1702(g), 1712(b), 1712(e)(3), 1714, 1715 (1982 & Supp. III 1985). The Secretary of Agriculture was directed to develop land use plans for forest lands. Mineral land status can only be changed pursuant to statute, and all lands within the National Forest System are under the authority of the Secretary of Agriculture and subject to all applicable laws, rules, and regulations.

116. *Granite Rock*, 107 S. Ct. at 1428.

117. 36 C.F.R. § 228.1 (1986).

118. 36 C.F.R. § 228.1 (1986); *Granite Rock*, 107 S. Ct. at 1427 (discussing the

Management.[119] Based on a determination that the FLPMA addresses land use and environmental controls separately, and that the USFS regulations state that mineral management is under the control of the BLM, the Court held that Congress intended to preempt state land use regulations but not state environmental regulations.[120]

C. *The Powell and Scalia Dissenting Opinions*

Justice Powell stated in his dissenting opinion that "[t]he most troubling feature of the Court's analysis is that it is divorced from the realities of its holding."[121] According to Justice Powell, the Court's assertion that it was not granting the Coastal Commission a veto power over mining on federal lands was an illusion.[122] If a state can require a separate permit prior to undertaking mining operations, Justice Powell explained, it can effectively veto the operation irrespective of any decision made by the responsible federal agency.[123]

Justice Powell noted that a careful balance between important but competing interests[124] is reflected in the federal permit system.[125] Granting the Coastal Commission authority to require a separate state permit necessarily upsets this balance.[126] However, because the California Coastal Act is an express land use statute, as noted by Justice Scalia the Coastal Commission's use of environmental regulations must constitute *land use* controls,[127] or the Coastal Commission is without state "police power" to regulate the activity.[128] Direct dual regulation of mineral production on federal lands has significant and disturbing implications for the American mining industry and the nation. These implications be-

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National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1982 & Supp. III 1985). The NFMA did not alter responsibility for federal land management between the United States Forest Service and the Bureau of Land Management. 16 U.S.C. §§ 1600-1601 (1982 & Supp. IV 1986). The only Secretary of Agriculture functions that were transferred concerned the Alaska Natural Gas Transportation System.

119. 36 C.F.R. § 228.1 (1986).

120. *Granite Rock*, 107 S. Ct. at 1429.

121. *Id.* at 1436 (Powell, J., dissenting).

122. *Id.* at 1437 (Powell, J., dissenting).

123. *Id.*

124. The development of the nation's resources on federal land versus preserving the natural environment from humans and their activities.

125. *Granite Rock*, 107 S. Ct. at 1437 (Powell, J., dissenting) (the federal agency must consider both local concerns *and* national resource needs).

126. *Id.* Direct state control creates an imbalance heavily weighted towards local interests.

127. *Id.* at 1438-41 (Scalia, J., dissenting).

128. *Id.* at 1439-40 (Scalia, J., dissenting). The Coastal Commission was only granted state power within the coastal zone.

come apparent when the facts and holding of *Granite Rock* are analyzed.

IV. Conflicts Between the Facts and the Holding in *Granite Rock*

A. Limits On the Coastal Commission's Authority

The Coastal Commission's authority to regulate land use activity is derived from the federal Coastal Zone Management Act[129] and the state's California Coastal Act.[130] Under the CZMA, Congress encourages the coastal states to effectively exercise its responsibility for coastal zones by developing and implementing management programs governing use of the land.[131] The state programs were to "coordinat[e] and simplif[y] . . . procedures . . . to ensure expedited governmental decisionmaking"[132] and to provide "improved predictability in governmental decisionmaking."[133]

Under the CCA, the state legislature granted the Coastal Commission the broadest power allowed by the CZMA.[134] If, as the Supreme Court noted, Granite Rock's unpatented mining claims on federal lands were excluded from the coastal zone,[135] then the Coastal Commission was without the authority to regulate this activity beyond compliance with the CZMA's authorized consistency review.[136] Justice Scalia noted that even if a state has inherent police power to regulate environmental concerns by the use of permits,[137] the Coastal Commission is without authority for the

129. 16 U.S.C. §§ 1451-1464.
130. Cal. Pub. Res. Code §§ 30000-30604.
131. 16 U.S.C. § 1452(2).
132. *Id.* at § 1452(2)(F).
133. *Id.* at § 1452(3).
134. Cal. Pub. Res. Code § 30008. "[W]ithin federal lands excluded from the coastal zone pursuant to the Federal Coastal Zone Management Act of 1972, the State of California shall, consistent with applicable federal and state laws, continue to exercise the full range of powers, rights, and privileges it now possesses or which may be granted." All federal land was excluded by Congress from the coastal zone.
135. *Granite Rock*, 107 S. Ct. at 1431. The majority assumed without deciding the issue that Granite Rock's claims were excluded from the coastal zone. The majority felt that it was irrelevant to the outcome whether these claims were included or excluded from the coastal zone. *Id.* at 1442 (Scalia, J., dissenting) (the "plain meaning" of the statutory language preempts state regulation of exempted federal lands). *See also* Letter from the United States Department of Justice to William Brewer, General Counsel of the National Oceanic and Atmospheric Administration, Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361 (N.D. Cal. 1984) (No. C-83-5137-WWS) (submitted by Granite Rock in the district court supporting the motion for summary judgment, stating that federal lands were excluded from the coastal zone by Congress under the CZMA.)
136. 16 U.S.C. § 1456(c).
137. *Granite Rock*, 107 S. Ct. at 1429. (This ability to regulate environmental concerns is based on the distinction made by the Court that severed environmental regulations from land use controls.)

direct regulation of mining activity on federal lands.[138]

Because the CCA only grants the state Coastal Commission power up to the restrictive limit imposed by the CZMA, the Coastal Commission must regulate *through* the federal permit system.[139] By express terms, the CZMA requires federal agencies to conduct activities, to the maximum extent practical, consistent with approved state programs.[140] The CZMA did not affect the federal-state balance of power concerning federal lands.[141] Prior to the enactment of the CZMA, states did not have the power to control mining activity on federal lands without federal consent, nor did the states obtain this power from the CZMA.[142] Under the Court's reasoning, states will now be able to directly control the *use* of federal lands merely by asserting that they are solely addressing environmental considerations.

B. Evisceration of the Mining Act and The National Mineral Policy

Under the United States Constitution, Congress has plenary authority over federal lands to make all necessary rules and regulations concerning use and disposal of the lands.[143] Under the Mining Act, Congress established the procedure for locating, developing, and producing minerals located on federal lands.[144] The National Mineral Policy[145] confirmed the importance of minerals to national commerce and the welfare of the nation.[146]

Under the Materials and Mineral Policy, Research and Development Act of 1980,[147] Congress confirmed, at a minimum, the intent to occupy the field of mineral production on federal lands.[148] Preemption by federal law occurs when Congress has expressed the intent to occupy the entire field or when the state law stands as an obstacle to the purposes and objectives of Con-

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138. *Id.* at 1438-42 (Scalia, J., dissenting).
139. *Id.* at 1441; 16 U.S.C. § 1456.
140. 16 U.S.C. § 1456(c).
141. *Granite Rock*, 107 S. Ct. at 1431.
142. *Id.* at 1441 (Scalia, J., dissenting). The status quo prior to enactment of the CZMA was presumed to be exclusive federal regulation. 30 U.S.C. § 28. Local mining rules recognized by the Mining Act concerned location (claim size), the manner of recording (local), and the amount of work (dollar amount) required to hold possession, so long as the local rules did not conflict with the Mining Act. *See also* 16 U.S.C. § 1456.
143. U.S. CONST. art. IV, § 3, cl. 2; *Granite Rock,* 107 S. Ct. at 1425.
144. 30 U.S.C. §§ 21-54.
145. *Id.* at § 21a.
146. *Id.*
147. 30 U.S.C. §§ 1601-1605.
148. *Id.* at §§ 1602-1603, 1604(a)(3). Congress expressly stated the purpose was to pursue measures that would assure availability of materials critical to commerce, the economy, and national security.

gress.[149] Congress directed the President, through executive agencies, to facilitate the availability and development of domestic resources.[150] Congress requested that the agencies present recommendations to Congress concerning removal of any impediments to the accomplishment of achieving an economically sound and stable domestic mineral industry.[151] The Secretary of Interior was directed to improve the availability of mineral data for federal land use decisions.[152] As discussed above, Congress was seeking to establish an adequate and stable domestic mineral supply.[153] Under the Supremacy Clause,[154] state laws standing as an obstacle to the full attainment of congressional purposes are preempted so long as the congressional action is founded in the Constitution.[155]

Allowing states direct control of mining activity conducted on federal lands pursuant to the Mining Act must necessarily be preempted because Congress has not delegated the control of reserved minerals to the states.[156] The real issue in *Granite Rock* was whether a state could apply direct control over mining activity on federal land *without* congressional approval. Based upon the Mining Act, the National Mineral Policy, the MMPRDA, and the United States Constitution, the answer must be no.[157]

Although a strong presumption exists that a state statute is valid as applied,[158] there are two arguments supporting the claim that the Coastal Commission's exercise of authority was invalid in

149. *Granite Rock*, 107 S. Ct. at 1425 (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); state law is preempted if it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress").

150. 30 U.S.C. § 1602.

151. *Id.* at §§ 1602-1603.

152. *Id.* at § 1604(e)(3).

153. *See supra* notes 45-47 and accompanying text. This Act was intended to reinforce and expand the National Mineral Policy (30 U.S.C. § 21a). The National Mineral Policy was enacted to "foster and encourage private enterprise" to develop a sound and economically stable domestic minerals industry (30 U.S.C. § 21a).

154. U.S. CONST. art. VI, § 2.

155. *See supra* note 149.

156. 30 U.S.C. §§ 22, 28. Minerals on federal lands are reserved to the federal government. Local rules, not in conflict with federal laws, concerning claim size, local recording of the claim, and the dollar amount of work required to hold possession are permitted by the federal government.

157. *Granite Rock*, 107 S. Ct. at 1438 (Powell, J., dissenting).

158. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 489 (1988). "As a corollary of the rule that state action will not be lightly found to be inconsistent with federal policy, not only are broad and abstract federal goals given scant preemptive effect, but even congressional goals that are tightly-stated will be interpreted narrowly when testing traditional forms of state action for conflict with these goals." (Discussing the Supreme Court's rejection in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), of a preemption defense to a tort claim arising in the nuclear safety field, a field which the court had earlier found to be occupied by the federal government.) *Id.*

this case. First, as noted by Justice Scalia, both the CZMA and the CCA are express land use statutes.[159] Unless environmental regulation is an element of land use control, a view contrary to the majority, the Coastal Commission is without the authority to impose environmental regulations. The Coastal Commission was granted state authority up to that allowed under the federal CZMA and was restricted to lands within the coastal zone. Even if a state has inherent police power to impose environmental regulations that affect federal lands, the Coastal Commission is not the proper state agency to impose regulations upon Granite Rock's operation.

Second, this dispute concerned mineral production from federal lands. The U.S. Constitution grants Congress exclusive control over federal lands.[160] Congress expressly reserved control of all minerals on federal lands[161] and, as discussed above, has implied an intent to occupy the field of mineral production on federal lands.[162] When state environmental regulations, such as here, impact so severely that they stop mineral production on federal lands, they are in effect land use regulations which deny land use for mineral production. This occurrence necessarily obstructs the congressional intent of establishing an economically stable domestic mineral industry.[163]

This does not mean that the states are powerless to impose environmental regulations on mining activity conducted on federal lands. It means that the states must operate pursuant to the congressionally approved federal regulatory system.[164] The states must cooperate and participate with the appropriate federal agency which is authorized to control the activity.[165]

C. Comments on the Supreme Court's Analysis in Granite Rock

It appears the Court was inconsistent in finding that the Coastal Commission had waived its statutory rights and then finding the

159. *Granite Rock*, 107 S. Ct. at 1438-39 (Scalia, J., dissenting). (The CZMA and the CCA both expressly state that they are land use statutes intended to control activity within the coastal zone.)

160. U.S. CONST. art. IV, § 3, cl. 2.

161. 30 U.S.C. § 21.

162. 30 U.S.C. § 21a; 30 U.S.C. §§ 1601-1605.

163. Congress did not disturb the existing federal control of minerals on federal lands by enacting the CZMA. All federal lands were expressly excluded from the coastal zone. The states were expressly entitled to a consistency review (which they could waive), which in effect did not provide the states with any greater rights than existed under prior federal statutes and regulations.

164. *Granite Rock*, 107 S. Ct. at 1437-38 (Powell, J., dissenting).

165. *Id.*

1983 permit demand valid.[166] It is disconcerting that the Court failed to acknowledge the existence of the National Mineral Policy,[167] as well as failing to recognize the importance of minerals to the very foundation of America's strength.[168]

Despite the recognition of preemption,[169] the Court failed to find it had occurred even though the state's objective frustrates the implementation of the National Mineral Policy.[170] A stable domestic mineral industry cannot be maintained when the Court allows states to regulate the production of federally owned resources on federal lands. By allowing the states direct regulatory control over mining activity on federal lands, the National Mineral Policy can be defeated by any state. The Court's holding, in effect, allows states to place local interests above the national need for a stable domestic minerals industry.

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166. *Id.* at 1423.

167. 30 U.S.C. § 21a; 30 U.S.C. §§ 1601-1605.

168. Following are a few examples of minerals used on a daily basis. Silver is critical to photography, jewelry, and the electronics industries. Gold is critical to the electronics, aerospace, medical, and financial industries. Radium and barium are important in medicine. Cobalt is critical in cancer treatment and to the national defense. Water is a necessity of life. Sand, gravel, calcium, and limestone are critical to the construction industries. Silica is required to make glass and computer chips. Iron, nickel, chromium, and molybdenum are used in steel. Platinum is used in catalytic converters for automobiles and in the chemical and electronics industries. Coal, oil, natural gas, and uranium are used for electric power generation. Petroleum products are used in the pharmaceutical, plastics, and synthetic fiber industries.

America must keep its basic mineral industries alive as long as the public continues to demand such minerals for consumption. Most of the latest technological advances designed to ease the rigors of life depend upon the availability of mineral resources. The economic health of the nation depends on the ability to produce and process its own raw materials.

It is doubtful that the present growth in the service sector of the nation's economy can sustain the economic health of the nation while unemployment continues to increase in skilled labor and professional positions. *See Nightly Business Report* (PBS television broadcast, Oct. 14, 1987). Discussing the fact that although unemployment is significantly lower than during the same period in 1986, consumers have significantly less spending power; the lower wages paid in the service sector do not provide a similar earning power to the wages that have been lost from the mining and manufacturing industries; *see* Denham, *Exploration Geophysics*, GEOTIMES, Feb. 1987, at 24 (approximately 25% of the geophysicists in the United States were unemployed during 1986, and 1986 saw 60% fewer seismic crews in the field than 1985, which was the lowest rate since *1936*). A 1986 survey shows more than 4% of the entire geoscience profession as unemployed while approximately 25% were underemployed, *e.g.*, geologists with more than 25 years of professional experience reporting an annual income of less than $20,000. The comparable starting salary in the profession was significantly higher during the same period, if an opening could be found. For each unemployed or underemployed professional there are approximately 20 unemployed or underemployed skilled labor specialists. Many additional people who work in the support industries are also affected. *AGI Survey of Geologists Shows Devastating Effect on Employment in Energy-Related Fields*, The Professional Geologist, July 1987, at 1.

169. *Granite Rock*, 107 S. Ct. at 1425 (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)).

170. *Id.* at 1431. (The Court failed to recognize minerals as being unique under federal law. This apparently resulted from a misunderstanding of the Mining Act and the failure to recognize the existence of the National Mineral Policy.)

The Court stated a narrow holding in the case by limiting it to the "barren record of this facial challenge,"[171] and by stating that it does not approve of any future application of the Coastal Commission's permit requirement conflicting with federal law.[172] However, this holding is, in effect, a broad one, granting the state sole control of mining activity occurring within the national forest on unpatented mining claims.[173] The Court allowed the states the right to deny a permit, thus preventing the mining activity even though the operator has received the necessary federal permit.

The Supreme Court made this unique finding by focusing on a select, narrow field of federal laws and regulations while ignoring the complex interrelationship of congressional goals behind the enactment of various laws.[174] The Court ignored the *effect* of all regulations, including environmental regulations, in *limiting* the possessor's ability to *use* the land for any chosen purpose and in any preferred manner.

This decision will inhibit the federal government's ability to encourage and promote the mineral development of federal lands. This decision will also disable the Forest Service and Bureau of Land Management's ability to comply with the congressional directive to implement the National Mineral Policy.[175] A brief review of the development of environmental regulation provides significant support for Justice Powell and Justice Scalia's positions. To control the use of land is in itself an attempt to control the environment.

V. Natural Resources: Environmental Regulation is Equivalent to Land Use Controls

A. Environmental Protection as the Justification For Land Use Controls

The sole function of environmental regulation is to control the manner in which land is used, and is in fact an outgrowth of common law nuisance.[176] Common law nuisance developed to close plant operations that were offensive to the plants' neighbors.[177] Due to the emission of offensive odors, feedlots and rendering

171. *Id.* at 1432.
172. *Id.*
173. *Id.* at 1434-36 (Powell, J., dissenting).
174. *Id.*
175. *Id.* at 1434-38 (Powell, J., dissenting).
176. R. Findley & D. Farber, Environmental Law Cases and Materials 226-29 (1985).
177. T. Hobann & R. Brooks, Green Justice: The Environment and the Courts 134 (1987).

plants were often enjoined from operation.[178] Manufacturing plants were often the target of closure due to offensive noise, dust, and smoke emissions.[179]

Two extreme views continue to persist when discussing environmental regulations. One considers the free market as the only valid economic consideration, while the other places an infinite value on select natural resources.[180] When balancing the value of minerals against the value of aesthetics, minerals cannot win when aesthetics are given an infinite value.[181] Locating a mine to produce minerals is *not* equivalent to locating a factory or selecting a town site. People choose town and factory sites based on what is best for their particular needs. Contrary to the assertion of some groups,[182] the miner's only control over mine location is in the selection of the mineral to be mined. Natural forces have determined the location of the minerals.[183]

Although amicus curiae briefs in *Granite Rock* filed on behalf of the Coastal Commission asserted that "[s]tate regulation would simply influence the location of mining operations, not the overall level" of operations,[184] these parties demonstrated a poor understanding of natural resources. As discussed above, the limestone deposit at Pico Blanco, recognized by the California Division of Mine and Geology as being in excess of one billion tons, is the largest deposit west of the Mississippi River with this degree of purity.[185] If two-tiered regulation prohibits an operation such as Granite Rock's at Pico Blanco from producing minerals, it not

178. *Id.*

179. *Id.*

180. C. MEYERS & A. TARLOCK, SELECTED LEGAL AND ECONOMIC ASPECTS OF ENVIRONMENTAL PROTECTION 19 (1971). The "free market theory" asserts that the landowner should be absolutely free to do anything on private land that the free market will allow. Environmentalists/conservationists assert that aesthetics, having an infinite value, can prohibit any activity on public or private land which will preserve it. A more reasonable view is to find a point between the two extremes, allowing for maximization of natural resource use and conservation. (Zoning is merely a more traditional terms than environmental regulation. However, if one looks to the justifications given for the majority of zoning regulations, they will find them supported by the desires of humans to control their environment. It is suggested that the difference between the statutes is one of origin. Zoning has historically been local in nature. Environmental regulation was developed at the national level to establish minimum standards that must be met uniformly throughout the country.)

181. *Id.*; *Amicus Curiae* Brief of The Big Sur Foundation filed on behalf of Appellant at 14, California Coastal Comm'n v. Granite Rock Co., 107 S. Ct 1419 (1987) (No. 85-1200).

182. *Amicus Curiae* Brief of the Big Sur Foundation Filed on behalf of Appellant at 20, *Granite Rock*, 107 S. Ct. 1419 (No. 85-1200).

183. Sherwood, *Zoning against Mining*, COLORADO LAWYER, July 1973, at 27-28.

184. *Amicus Curiae* Brief of The Big Sur Foundation Filed on Behalf of Appellant at 20, *Granite Rock*, 107 S. Ct. 1419 (No. 85-1200).

185. *See supra* note 3.

only stops production at Pico Blanco but halts production of this mineral throughout the western United States.[186] This would have a significant effect on the nation's self-sufficiency, and a direct impact on the cost of using this quality of limestone to reduce emissions into the environment.[187] So long as a demand for the product continues to exist, the loss of production would also affect both intrastate and interstate commerce.

B. Today: Land Use Planning Necessarily Includes Environmental Protection

The Coastal Zone Management Act and the California Coastal Act recognize environmental protection as a significant *element* of land use planning.[188] In addition, Forest Service regulations require the agency to comply with the National Environmental Policy Act, the Federal Clean Air Act, the Federal Water Pollution Control Act, state and federal solid waste disposal standards, and any special regulations required under specific legislation for an area. The agency must also design and conduct operations, to the extent practical, in harmony with local scenic values, and the agency must reclaim the disturbed surface area.[189]

Prior to approval of Granite Rock's "Plan of Operation," the Forest Service conducted a complete environmental assessment[190] of the project with the cooperation of interdepartmental agents and the state agencies[191] that responded to the notice of intent[192]

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186. *California Section News*, THE PROFESSIONAL GEOLOGIST, May 1987, at 6 (Senate Bill No. 7 reintroduced by Senator Alan Cranston, would close two-thirds of the federal desert lands in California by designating the lands as Wilderness or Nation Park Systems. The bill would prohibit energy and mineral exploration *and* stop current mineral production from the region); *Alaska Mining Case*, THE PROFESSIONAL GEOLOGIST, June 1987, at 2, discussing Sierra Club v. Penfold where the plaintiff is seeking to close 80 million acres to mining which affects nearly 85% of all mining in Alaska); *Religion and Road Construction*, THE PROFESSIONAL GEOLOGIST June 1987, at 3 (discussing closure of forest lands for religious reasons). Subsequently, the United States Supreme Court addressed the issue of religion as grounds to close public lands. In Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319, 1321 (1988), the Court held that the first amendment free exercise clause does not forbid the government from permitting timber harvesting or constructing a road through a portion of a national forest that had traditionally been used for religious purposes by the three American Indian tribes.

187. *See supra* note 2.

188. 16 U.S.C. § 1452; CAL. PUB. RES. CODE §§ 30001-30001.5.

189. 36 C.F.R. §§ 228.4, 228.8 (1986); National Environmental Policy Act, 42 U.S.C. § 4332 (1982 & Supp. III 1985). Congress established the Council of Environmental Quality, and requires *each* separate federal agency to comply with NEPA rather than requiring each separate federal agency to establish its own environmental standards. *Granite Rock*, 107 S. Ct. at 1435 (Powell, J., dissenting).

190. Environmental Assessment and Revised Plan of Operation, Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361 (N.D. Cal. 1984) (No. C-83-5137-WWS).

191. *Id.* (California Regional Water Quality Control Board, California Department of Game and Fish, and the Monterey Bay Unified Air Pollution Control District; the California Coastal Commission was notified but elected not to participate in planning.)

192. 36 C.F.R. § 228.4 (1986).

submitted by Granite Rock. The Coastal Commission received notice of Granite Rock's planned activity from the USFS and elected not to participate during the planning phase.[193] This voluntary nonparticipation constituted a statutory waiver of the right to participate in planning the control of the operation.[194] Following completion of the environmental assessment,[195] which concluded compliance with all applicable federal and state controls, Granite Rock received a "Revised Plan of Operation."[196]

The revised plan significantly altered the manner in which Granite Rock could use the land. Granite Rock originally proposed to dump the overburden (waste material) into adjacent ravines, thereby reducing short-term visual impact and keeping the cost down, but losing the material for reclamation purposes.[197] However, concern for minimizing overall long-term visual impact led the USFS to require Granite Rock to save the overburden on a storage pad, thereby maintaining its availability for use during reclamation of the disturbed area.[198] Concern for public safety also led the USFS to require Granite Rock to physically close (by posting personnel) hiking trails in the near proximity prior to "blasting" in the quarry.[199]

Justice Powell noted that it was difficult to perceive any additional benefit to the state or environment by allowing the Coastal Commission the right to demand a separate permit[200] outside the established federal regulatory system.[201] The applicable federal

193. Answer to Amended Complaint, *Granite Rock*, 590 F. Supp. 1361 (No. C-83-5137-WWS).

194. *Granite Rock*, 107 S. Ct. at 1430 (this right was waived for the permit covering the time period of 1981-1986). (The Coastal Commission could properly re-enter the process if Granite Rock were to apply for renewal of the permit, or if it applied for any modifications during the valid time period of the permit.)

195. It should be noted that the sole purpose of environmental consideration while developing the "Plan of Operation" is to regulate the manner in which the land is used while conducting operations, thereby minimizing adverse impacts to the environment. 36 C.F.R. § 228.8 (1986).

196. *See supra* note 10.

197. Plan of Operation, *Granite Rock*, 590 F. Supp. 1361 (No. C-83-5137-WWS).

198. *Id.* Revised Plan of Operation.

199. *Id.*

200. In this case a coastal development permit.

201. *Granite Rock*, 107 S. Ct. 1419, 1438 (Powell, J., dissenting). The Environmental Assessment and "Revised Plan of Operation" addressed the following areas: production and conservation of minerals; recreation; watersheds; wildlife; range and forage; aesthetics, both short and long-term; access; fire prevention; waste disposal; public safety; sight visibility from hiking trails and the highway; archaeology; ethnology; erosion; fisheries; sociology; economics; natural hazards; reclamation; revegatation; public concerns; and the relationship to other federal and state goals. Environmental Assessment and Revised Plan of Operation, Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361 (N.D. Cal. 1984) (No. C-83-5137-WWS).

laws and regulations provide for state and local government input into the federal permit process and for the federal agency to comply with all reasonable local requirements.[202] Federal laws also provide for public input through the public meeting process.[203] This allows the appropriate federal agency to balance local needs and concerns against the national need for the specific product.

If a state's direct permit requirements must also be reasonable, as stated by the Court majority, to avoid being a "taking,"[204] then the sole effect of this dual permit system is to place an additional burden on the mining industry.[205] Assuming "reasonable" has the same meaning under state and federal applications, then state regulations should be the same whether applied directly or through the controlling federal permit system. This additional burden is not likely to produce any benefit of greater quality or quantity than would full compliance with the existing statutory and regulatory framework that controls mining on federal lands. The resulting effects of the *Granite Rock* decision will, however, detrimentally impact the mining industry, federal agencies, and the consumer.

VI. IMPLICATIONS OF *Granite Rock* TO AMERICA

A. National Impact

The most direct impact on the nation from the *Granite Rock* decision is the present inability to implement the National Mineral Policy.[206] The Supreme Court's holding,[207] in effect, man-

202. 36 C.F.R. § 228.8 (1986).

203. National Environmental Policy Act, 42 U.S.C. § 4345 (1982 & Supp. III 1985); 36 C.F.R. § 228.5 (1986).

204. *Granite Rock*, 107 S. Ct. at 1428. The majority did recognize the Coastal Commission's assertion that the Mining Act does not preempt state regulation unless the state completely *bans* mining. The Court quickly dismissed this by assuming the Coastal Commission would always act in a reasonable manner and would not directly or indirectly ban mining. *See infra* note 221. This does not seem to be a logical presumption on the part of the Supreme Court considering that within three months of this decision the Court found that the Coastal Commission acted unreasonably in Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987). Further, prior to the *Granite Rock* decision and continuing through the present, conflicts exist between the Coastal Commission and several oil companies trying to operate their federal offshore oil leases. A significant part of the Coastal Commission stand concerning offshore oil leases reflects capricious conduct and local self-interest.

205. *Granite Rock*, 107 S. Ct. at 1438 (Powell, J., dissenting). A dual permit system serves no useful purpose but does create a very real potential for conflict between state and federal decision makers. In this case the potential conflict is without merit because the state has no authority over *minerals* on federal land. The additional cost of obtaining a second permit, even if conflicts are ignored, are costs imposed on the industry without any economic return to anyone or of a benefit to the environment considering the time and money invested.

206. 30 U.S.C. § 21a; 30 U.S.C. §§ 1601-1605.

207. *Granite Rock*, 107 S. Ct. at 1431.

dated separate state mineral policies.[208] Each state is allowed to control mining activity on federal lands so long as the control is defined in environmental terms. States that wish to prohibit mining within the state can rely on this holding to place local interests above national needs. And, ironically, many of the states that wish to strictly control or prohibit mining (e.g. California) are among the nation's largest *consumers* of raw materials, in the form of finished products.[209] The immediate effect of this decision falls upon the mining industry, but the ultimate effect will be borne by the American public.[210]

B. The Impact on Federal Agencies

The United States Forest Service suffered directly from the *Granite Rock* decision through lost control over mining activity on forest lands, while remaining burdened with the ultimate responsibility for properly managing forest lands. This decision affected all federal agencies that must comply with the Mining Act, whether directly or indirectly, due to legislation containing a directive to implement the National Mineral Policy. This conflict of authority between the states and the federal governments will present difficulties for federal agencies in complying with congressional directives and also poses problems for the mining industry in determining which agency really controls when conflicts arise.[211]

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208. Letter from Don H. Sherwood, Attorney to Carl D. Savely (August 11, 1987) (outline of remarks on *Granite Rock* presented at the Rocky Mountain Mineral Institute's summer 1987 meeting at Vail, Colorado).

209. Meyerhoff, *Oil & Gas*, GEOTIMES, Feb. 1987, at 43 (the State of California is the *world's* third largest gasoline consumer).

210. In short, the *Granite Rock* decision will likely force the nation toward: (1) an increasing dependence on foreign sources of raw materials; (2) a potentially increasing trade deficit due to reliance on the import of raw materials and manufactured goods resulting from the loss of domestic manufacturing ability; (3) the continual loss of jobs at the professional and skilled labor levels; and (4) higher prices for all consumer commodities in the long-run. *See* Park, *Book Review*, 81 ECONOMIC GEOLOGY 1568 (1986).

211. The Forest Service must comply with the Mining Act and strive to implement the National Mineral Policy while complying with other federal laws and policies. If a state's direct regulatory activity stops an otherwise permissible activity, must the dispute wait to be resolved by the Supreme Court? Where does a private party stand when a conflict as to requirements exists between the state and federal agencies? After *Granite Rock* the states can stop private activity on federal land which leaves the private individual without legal recourse. *See* Letter from Don H. Sherwood, Attorney to Carl D. Savely (August 11, 1987) (the Court has removed all legal restraint from regulatory agencies in the control of mining operations).

C. *Effects on the Mining Industry*

The mining industry presently holds two opposing views regarding the effect of *Granite Rock.*[212] The dominant view is that the Court's decision permits the states and local governments to nullify the Mining Act through land use legislation.[213] This group recognizes the fact that environmental regulation is the most effective means of land use control.[214] This does not represent a plea by the industry to end all regulation but a request for an understanding of natural resources and the use of reason in the type and manner of regulations applied to mining operations.

The Court sanctioned dual-permit system will increase costs through duplication,[215] increase time delays that are presently beyond reasonable limits,[216] increase the real probability of lost sources of new production, and decrease revenue available for research and development.[217] The dual-permit system is likely to force the small miner from the field.[218] There appears to be a

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212. Letter from William G. Langston, Vice-President and General Counsel of Homestake Mining Co. to Carl D. Savely (July 14, 1987).

213. Telephone interview between James S. Burling, Attorney and Carl D. Savely (July 6, 1987) (discussing *Granite Rock* and the impact of the Supreme Court's decision on the American mining industry); *see also Amicus Curiae* Brief of the American Mining Congress Filed on Behalf of Respondent at 13, California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987) (No. 85-1200). *See infra* notes 233-34 and 237-38.

214. *See supra* notes 186 & 208; *see also* Wall St. J., July 17, 1987, at 5a, col. 4 (state land commission denies permit based on aesthetics); San Diego Union, July 18, 1987, at B-8, col. 1 (no trees in Del Mar allowed to block neighbors view of the ocean); San Diego Union, July 25, 1987, at B-4, col. 1 (an order to burn cleaner fuels even though it is more expensive than crude oil derivatives); Wall St. J., June 30, 1987, at 36, col. 3 (EPA to ban industries in 14 metropolitan areas).

215. Increased costs reduce the amount of ore, since ore by definition is mineral that can presently be extracted and sold at a profit. The added costs of dual applications, filing, and reporting amount to unproductive administrative overhead that does not produce a return on investment to a company paying the expense or to the protection of the environment.

216. Letter from Joel Swank, Prospector and Miner, to Carl D. Savely (August 11, 1987). The letter discusses his personal experience in obtaining an access permit to existing and valid mining claims. Twenty-six hundred feet of road was closed to motorized vehicles in 1981 by the BLM. Application for access was made immediately to the BLM in 1981. The BLM Board of Appeals ruled in 1985 that access could *not* be denied, and remanded the application to the local BLM office. As of the date of this letter, access had *not* been granted. This is a delay of six years just seeking access to valid claims over a road that still exists, though closed to motorized vehicles. It should be noted that these claims are *not* in a wilderness or wilderness study area. *Id.*

217. Homestake Mining Co., Lead, South Dakota. Research led to the development and patenting of microorganisms that devour cyanide, neutralize it and remove it from the water used during ore processing. Telephone interview between Jim Whitlock, Chief Analyst, Homestake Mine, Lead, S.D. and Carl D. Savely (April 11, 1988). In the Bulldog Mountain Mine, Creede, Colorado deer and elk use the mine property and water treatment plant as winter range. The Rio Grande valley floor, which is the natural winter range, is being filled with summer homes and retirement homes. The public and private land held by the mining company is protected from the public and the encroachment of new homes.

218. Historically, and still today, it has been the small-miner/prospector who has

Court bias against the mining industry as reflected in recent decisions concerning property rights.[219]

The analysis in *Granite Rock* conflicts with subsequent Court decisions concerning property rights.[220] In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[221] the Supreme Court clearly failed to distinguish between land use control and environmental regulation where Los Angeles County banned reconstruction within a natural floodplain.[222] The effect is the same whether construction is banned because it is proposed within a floodplain, or banned because at some future time building and content debris might be introduced into a natural water course.[223]

In *Nollan v. California Coastal Comm'n*,[224] the Supreme Court held that the Coastal Commission could not extort an easement from beach front property owners as a condition for granting a building permit when based on "visual access" to the beach.[225] The Court expressly rejected the concept that home construction created a "psychological barrier" to beach access.[226]

In contrast, a less popular view within the mining industry contends that the *Granite Rock* decision will benefit the industry by depriving the environmentalists of the argument[227] that the Min-

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made the discoveries and conducted the initial development prior to the large mining companies, with capital resources, entering the scene. Field, as used in this context, refers to prospecting and exploration conducted on the ground. *See supra* note 216.

219. Sherwood, *Zoning Against Mining*, Colorado Lawyer, July 1973, at 27-28 (This article expresses the opinion that zoning and land use planning restrictions of *all* kinds are biased against the mining industry).

220. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987) (The Court held that the county must pay for a temporary "taking" brought about by regulations that deny the right to rebuild within a floodplain); Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987) (The Court held that the Coastal Comm'n cannot extort a beach easement for public use from a landowner as a condition precedent to the granting of a building permit within the coastal zone).

221. 107 S. Ct. 2378 (1987).

222. *Id.* at 2381. It is suggested that if the Court had found a construction ban to be *environmental* in nature that the Court would not have found a taking. If environmental in nature, operations would merely cease because the operator could not comply with the regulation.

223. Logic dictates that the effect is the same—no private party can use the land regardless of the asserted policy justification underlying the construction ban. Whether phrased in public safety language, to prevent the future loss of life during flooding; or phrased environmentally to prevent the pollution of surface water, the effect is the denial of all use by the private land owner by government regulations.

224. 107 S. Ct. 3141 (1987).

225. *Id.* at 3147.

226. *Id.*

227. Other arguments used by the environmentalists urging amendment of the Mining Act are: (1) all mineral lands should be leased; (2) production royalties should be paid to the federal government on all mineral production; (3) all mineral leases should go to the highest bidder (as presently occurs with coal, oil, and gas); (4) lands open to mining should be the exception rather than the rule; and (5) mines can always go somewhere else.

ing Act needs to be amended[228] in order to reflect the views of modern society.[229] It seems this group is relying on the stated holding of *Granite Rock* rather than on its effect, which is to defeat the stated National Mineral Policy and the purpose of the Mining Act.[230]

At present, environmental groups are pressing suit in Alaska against the BLM.[231] This suit, if successful, will halt approximately eighty-five percent of all mining in Alaska.[232] The mining industry, except for gold, has been in "progressive retrenchment" for the last ten years.[233] If this trend continues, the United States will cease to be a major mineral producer by 1990.[234] However, this will *not* occur due to a lack of resources. The phasing out of production, processing facilities, and refineries, combined with a diminishing supply of economic geologists is resulting in the United States' rapid inability to supply its own resource needs.[235]

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228. Although some feel this decision deprives environmentalists of an argument used for urging amendment of the Mining Act, this is of doubtful effect considering ongoing litigation and Wilderness legislation. Also, segments of the mining industry have proposed amending the Mining Act to reflect the present resource situation. It has been urged that surface outcrop no longer be required (because the easy-to-find surface deposits were located long-ago); and the extralateral (down-dip) mining rights be terminated, adopting instead vertical lines consistent with other property law. For more discussion *see* P.T. FLAWN, MINERAL RESOURCES 174-78 (1966).

229. Letter from William G. Langston, Vice-President and General Counsel of Homestake Mining Co. to Carl D. Savely (July 14, 1987).

230. 30 U.S.C. §§ 21-54; 30 U.S.C. § 21a; 30 U.S.C. §§ 1601-1605.

231. Sierra Club v. Penfold, 664 F. Supp. 1299 (D. Alaska 1987). The district court granted a delayed injunction against the BLM, which went into effect at the end of October 1987. This injunction effects mine operations being conducted pursuant to a "Plan of Operation." The court retained jurisdiction of the matter and will not lift the injunctions until satisfied with the four separate regional Environmental Impact Statements the court ordered the BLM to complete. This decision appears to be an aberration from existing law.

232. The Sierra Club's goal is to close 80 million acres in Alaska to mineral exploration and production. The Professional Geologist, June 1987, at 2. The Sierra Club, through Wilderness designation, seeks to prevent mining on a "per se" basis. In non-wilderness areas the organization does not expressly state the intent to prevent mining on a "per se" basis, though the regulatory burden and aesthetic value sought, when imposed, has the effect of preventing mining on a "per se" basis. The Sierra Club continually makes the argument that the mine can pick up and move to a less sensitive area, never recognizing that nature located the mineral deposit, *not* the miner. In many instances it is the geology and mineralogy of the area that creates the aesthetic value now being protected above all other considerations. It appears that the Sierra Club was partly successful in the *Penfold* case and convinced the court to enjoin BLM from allowing mine operations to be permitted by a "Plan of Operation" until regional studies were completed. This decision has a significant effect on the mining industry even though the injunction affects significantly fewer operations than the Sierra Club originally sought to enjoin. This injunction amounts to a court ordered "taking" of private property allegedly for the public good.

233. Ernst, *United States Earth Sciences, Status and Future: How Bad, How Good?*, 99 GEOLOGICAL SOCIETY OF AMERICA BULLETIN 1, 2 (1987).

234. *Id.* (citing a 1986 personal communication from Charles Mankin, of the National Research Council Board on Energy and Mineral Resources).

235. *Id.*

However, all is not lost if the American public and Congress awaken and respond in a reasonable and responsible manner to the existing situation.

D. A Time of Decision

America is presently faced with a choice of alternative courses regarding mineral production. As with any decision the proper method is to make the decision from an educated and informed basis. Before the public, legislatures, and the courts[236] can make wise decisions, they must understand that minerals are naturally located, and that every product consumed, whatever the form, originated from materials derived from the ground.

The nation can elect to follow the philosophy that "mining is okay, but not in my backyard,"[237] which is reflected by the Supreme Court's decision in *Granite Rock* that allows direct state control over mining activities on federal land. This choice will likely result in the continued decline of America's ability to provide raw materials for its own consumption.[238] In the short-term, prohibiting mining will provide limited protection for the aesthetics of America's natural environment, though not prohibiting excessive consumption of the resource by people in general.[239] The effect is that America is exporting the environmental risk associated with resource production to other nations while trying to reap all the benefits from resource consumption. Fortunately, there is a wiser course of action.

The nation could adopt a mining philosophy that requires consumers to assume the risks associated with raw material production. This calls for a recognition of the fact that all products people create for use have an origin in raw materials derived from the earth. The federal statutes and regulations have recognized that national needs must be met from local sources.[240] The system

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236. Courts, when interpreting statutes, should refrain from judicial legislation. When natural resources are at issue, the courts should consider the public policy behind the enactment of each relevant statute and the goal that the statute was intended to accomplish.

237. Dickerson, *Mineral Exploration*, GEOTIMES, Feb. 1987, at 39, 40.

238. *Id.* at 39-40. (Is it moral to export all risk associated with resource production and processing while continuing to demand all the benefits from these same resources?)

239. *Amicus Curiae* Brief of the Big Sur Foundation on Behalf of Appellant at 13, California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987) (No. 85-1200) (stating the area is used by 2.9 million tourist per year).

240. 30 U.S.C. § 22 (this statute provides that mineral lands are reserved to the federal government); 30 U.S.C. §§ 1602-1603 (this statute directs a national inventory of all mineral resources and mineral uses with data from industry; federal, state, and local agencies; and directs cooperation between federal, state, and local governments with private industry to ensure a domestic supply of minerals while also considering local and national environmental needs). Logic dictates that whether the actual source of raw materials

presently in place provides for environmental protection, including local needs, and the orderly development and production of natural resources.

It is suggested that new rules are not needed, but rather that there be full compliance with existing laws by all federal, state, and local agencies as well as private individuals and businesses. The public in general should recognize that mining operations have to be located where the mineral exists; after all, mineral deposits can not be relocated.[241] The system presently in place provides for environmental protection, including local needs, and the orderly development and production of natural resources.

E. How the Courts Can Legitimately Help Remedy a Wrong

First, the Supreme Court should recognize the existence of the National Mineral Policy and its critical relationship to the nation's economic health and independence. Moreover, the Supreme Court should recognize the fact that environmental regulation and land use control are *inseparable.*

Second, the Court should recognize the unique status of minerals under the Mining Act. With this recognition comes a further understanding of the interrelationship between the controlling laws and regulations. Whether regulations are labeled "land use" controls or "environmental" regulations, its *effects* on limiting and/or prohibiting mineral production are the *same.* Furthermore, as the Supreme Court noted in *Granite Rock*, federal law preempts state land use controls from operating on federal lands. Where, as here, state environmental regulations so effect federal lands as to deny land use for mineral production, they are in effect land use controls and should also be preempted.

Finally, the Court should not disable and leave the mining industry without legal recourse from the politics of state and local governments.[242] In situations such as *Granite Rock*, the Court should not create new law due to a state regulatory agency's own negligence or expressed unwillingness to participate during planning.[243]

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is foreign or domestic they must be obtained from a *local* source.

241. What would the average American citizen think, if the other countries of the world adopted the American attitude that "mining is okay, but not in my backyard"? After all, "gold is where you find it." *See supra* note 237.

242. Letter from Don H. Sherwood, Attorney to Carl D. Savely (August 11, 1987) (outline of remarks on *Granite Rock* presented at the Rocky Mountain Mineral Institute's summer meeting at Vail, Colorado).

243. *Granite Rock*, 107 S. Ct. at 1430. The Supreme Court agreed that the Coastal Commission had waived its statutory right to a consistency review.

CONCLUSION

The Supreme Court's view of land use and environmental regulation is not readily acceptable when one recognizes that the two types of regulations are only different ways to describe methods for reaching the same result. The *Granite Rock* decision invalidated existing law, created new law, and effectively barred the attainment of the National Mineral Policy. The real issue in *Granite Rock* was not whether states could regulate mining activity on federal land but whether states, under existing law, could regulate mining activity directly, rather than within the federal permit scheme.[244]

Although *First English Evangelical*[245] and *Nollan*[246] may assist the mining industry out of the *Granite Rock* problem, these cases are insufficient by themselves. The effect of *Granite Rock* must be countered by Congress, or the Court must correct its own error, if mining in America is to survive.

Mineral production does not mean the abandonment of environmental concerns. To the contrary, today the mining of minerals can often lead to improvement in the local environment and in the environment at large.[247] What is needed is the understanding that all products, whether "natural"[248] or "synthetic,"[249] originally derive from the earth.[250]

A healthy and safe environment in America is dependent on a better understanding of the earth and the wise development of its resources.[251] This note suggests, contrary to *Granite Rock*, that with respect to minerals, *environmental* and *land use* regulations are essentially identical. It is suggested that recognition of this fact will lead to informed decisions that will allow for environmen-

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244. Federal regulations provide effective means for state, local, and public involvement. However, under the federal regulatory scheme the interested parties, after notice, must participate during planning (as they should). One who receives notice and elects not to participate during planning should not be entitled to later stop a validly permitted operation by screaming "foul" and then asserting control. Federal law properly accounts for this by providing a *conclusive* statutory waiver of rights upon nonparticipation.

245. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378 (1987).

246. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

247. *See supra* note 2. The five largest consumers of this quality of limestone devote the use to improving the environment by removing acids from the air and water. This use helps to decrease the acid rain potential.

248. In the state found prior to processing.

249. Man-made products created by separating or combining natural elements into new forms.

250. To resolve the *Granite Rock* problem, it is necessary that all factions recognize the complex nature of minerals; mankind's present day dependence on finished goods; the source of the elements used to manufacture goods; the naturally limited choice of mineral deposits; and that a local decision can have an effect which is felt around the world.

251. *See supra* note 232.

tal protection and the attainment of an economically stable domestic mineral industry.

*Carl D. Savely**

* C.P.G. #6662. This Note is dedicated to my wife, Jill and my children, Byron and Nadine.